

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C. 20001**

**'Notice: This is an electronic bench opinion which has not been verified as official'**

Date: August 25, 1997

**Case No. 96 INA 0661**

In the Matter of:

**ULTRA CREATIVE CORPORATION,**  
Employer

on behalf of

**JAROSLAW CHECKO,**  
Alien

Appearance: P. W. Janaszek, of New York, New York, agent.

Before : Holmes, Huddleston, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of JAROSLAW CHECKO (Alien) by ULTRA CREATIVE CORPORATION (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182 (a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer and Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

able at the time of the application and at the time and place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.<sup>2</sup>

### **STATEMENT OF THE CASE**

Employer filed this application for labor certification on behalf of the alien for the position of "Parts Salvager, Printing Machines." AF 06. Employer offered \$13.00 an hour for this position, which required 40 hours a week. Employer's educational requirement was completion of high school and in addition it required two years' experience in the job offered.

**Notice of Findings.** The Certifying Officer (CO) issued a Notice of Findings (NOF) on March 17, 1995 proposing to deny certification. AF 40. The CO noted that three other applications for parts salvager had been granted and questioned whether this additional job included duties which would be performed on a daily basis within a permanent full time schedule. The CO listed information which could be submitted on rebuttal which would document permanent, full time employment for the job described.

**Rebuttal.** Employer submitted rebuttal evidence on April 16, 1995 including a list of the printing machines used in its business, a list of bills for replacement parts and service on the older machines, a list of newly purchased machines and Employer's income tax forms for 1993 and 1994. Employer contended the information submitted established the need for two additional parts salvagers to perform their job duties on a daily basis in order for the business to utilize the machines which require repair, maintenance, and preventive maintenance. AF 227.

**Final Determination.** The CO issued a Final Determination on April 28, 1995 denying certification. The CO noted the bills submitted established activity in the job position. The CO found, however, there was not sufficient information submitted on rebuttal to establish that there was enough activity to warrant the need for two additional full time positions, in addition to the three already approved, to perform the job duties. Specifi-

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

cally, the CO stated the amount spent on repairs as documented in the rebuttal evidence was minimal when compared to the total dollar volume of business performed during this same time period. Employer failed to document the services of the job offer are required on a continuous basis given the complement of staff in house. AF 230.

**Appeal.** The Employer filed a request for review on May 31, 1995. AF 251. Employer stated its rebuttal evidence establishes its volume of sales is increasing and, thus, it has established the need for additional workers. The Employer also stated it could not document the salvaging activities as required by the CO because this work is not performed for customers, but rather is performed in-house to maintain the printing machines on which Employer's printing business is performed. Finally, Employer contended the CO's assertions regarding the company lacking sufficient volume to hire the alien workers is speculative. AF 251.

## DISCUSSION

Employment is defined as permanent full time work by an employee for an employer other than oneself for the purposes of the implementation of the Act. 20 CFR § 656.3. The Employer bears the burden of proving that a position is permanent and full time. Certification may be denied, if the Employer's evidence does not show that a position is permanent and full time. **Gerata Systems America, Inc.**, 88 INA 344(Dec. 16, 1988).

The NOF directed the Employer to file evidence that this position was permanent and full time, observing that the Employer had three other employees performing the same job duties. When the Employer's rebuttal submitted documentation establishing some activity in the job required, the CO found in the Final Determination that this documentation did not establish that two added employees were needed to perform the job duties.

As the CO noted, the bills for parts and maintenance that the Employer filed as rebuttal evidence established only that the repair and maintenance work was a minimal part of Employer's business. While alleging that it had bought additional machines and that the expansion of its printing business required it to hire additional parts salvagers, the Employer did not submit any documentary or other evidence to support this statement. Employer did not, for example, submit either receipts for the added machines that it claimed it recently had purchased or proof of the recent expansion of volume of its business.

On reviewing the entire record of this case it is apparent that the CO correctly concluded that Employer failed to sustain its burden of proof that the position at issue was permanent full

time employment within the meaning of the Act and regulations. The significant circumstances of this case include the admitted fact that the Employer already has three full time employees engaged in performing the same job duties as this position, all of which constitutes a minimal part of the Employer's operation. As the Employer failed to submit evidence to support the addition of more full time employees to perform the same work, the CO clearly did not base the denial of this application on speculation. Rather, it found that the CO correctly concluded that the Employer failed to prove that the job opportunity was permanent full time employment, based on evidence of record, and the on absence of Employer's proof of essential supporting facts under the Act and regulations.

As the CO properly found the Employer failed to establish the permanent full time employment required by 20 CFR § 656.3, the CO properly denied Employer's application for certification, and the following order will enter.

**ORDER**

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

## BALCA VOTE SHEET

Case No. 96 INA 0661

ULTRA CREATIVE CORPORATION, Employer  
JAROSLAW CHECKO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: August 18, 1997